IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1194 of 1997

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT WATER SUPPLY AND SEWERAGE BOARD

Versus

DILIP J SHAH

Appearance:

MR HS MUNSHAW for Petitioner

MR TR MISHRA for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 17/10/2002

ORAL JUDGEMENT

1. This is a petition under Article 227 of the Constitution of India, though styled as one under Articles 226 and 227 of the Constitution of India.

2. The petitioner Board challenges herein the

judgement and award of the Labour Court Bhavnagar in LCB (New) Reference No.332/87, dated 24th May 1996, whereby the respondent-workman has been granted reinstatement with full backwages to his original post, with the stipulation that the posting will be in Umrala Sub-Division of Bhavnagar Division.

3. There cannot be any doubt that since the petitioner is challenging the award of the Labour Court as aforesaid, this can be a petition only under Article 227 of the Constitution of India whereby the powers of superintendence of this Court have been invoked.

4. Before proceeding further on the merits of the matter it is desirable to keep in mind the observations of the Supreme Court in the case of (i) Mohmmad Yunus Vs. Mohammad Mustaqim (AIR 1984 SC 38, (ii) Khalil Ahmed Bashir Vs. Tufelhussein S. Sarangpurwala (AIR 1988 SC 184) and (iii) Ashok Kumar Vs. Sita Ram (2001(4) SCC 478) on the question of the scope and ambit of the jurisdiction of this Court in the context of the powers which this Court may exercise under Article 227 of the Constitution. The Supreme Court has observed in the aforesaid cases that the High Court, while examining a petition under Article 227 of the Constitution of India, cannot reappreciate the evidence and cannot disturb the findings of fact recorded by the courts below except where the same are perverse, and even errors of law cannot be corrected. Suffice it to say that this Court cannot enter into the quality of the decisions rendered; at best, it may only examine the decision making process adopted by the fora below.

5. The case of the respondent workman was specific and clear, as put up before the Labour Court.

6. There is no dispute that the respondent workman was employed by the petitioner Board as a Work-Charge Mistry. There cannot be any dispute (as seen from the appointment orders on pages 15, 16 and 17) that (i) the respondent workman was appointed as a Work-Charge Mistry, (ii) that each appointment order specified that the appointment was by way of stop-gap arrangement, (iii) that each order specifies appointment for a limited period of 29 days, and (iv) that the monthly pay was Rs.260 in the pay-scale of Rs.260-400 plus usual allowances.

7. There is no doubt that each of these orders emphasises that the appointment is purely on a stop-gap arrangement, that it is purely on a temporary basis, that

it is only for 29 days, and that on the completion of 29 days the appointment order shall stand cancelled automatically.

8. However, there is no dispute that the first of such appointment orders (page 15) was issued on 31st January 1981, and that the last of such orders was issued on 15th October 1981 (page 17). Thus, for almost 10 months the respondent workman was employed on the terms and conditions set out hereinabove, for 29 days at a time.

9. It is in this context that the respondent workman contended before the Labour Court that this amounted to giving artificial breaks in the employment, which breaks were not justified on the facts and not justified looking to the requirements of the petitioner Board. It is in this context that it is vehemently contended that giving artificial breaks, even by specifically emphasising the stop-gap nature of appointment, or a specific tenure in such appointment orders, is a practice which has been consistently and thoroughly disapproved of by the Supreme Court.

10. This proposition of law does not require discussion of the various Supreme Court decisions. It is well settled law that when it is found that specific short tenure appointments are made, and such similar appointment orders are issued from time to time with an artificial break in between, this practice cannot be accepted, merely with a view to deprive the workman of the benefit of section 25-F of the Industrial Disputes Act, or to deprive him of the benefit of regular employment. On the facts of the present case, particularly in view of the petitioner's own case, propounded through Annexure-A (page 18) of the petition the workman has factually put in service of 305 days between his first and last appointment orders. It requires to be clarified that Annexure-A (page 18) to the petition is a statement prepared and drawn by the petitioner-employer which may or may not tally with the statement filed in the Labour Court by the respondent workman at Exh.17, or by the statement filed before the Labour Court according to the employer at exh.16. However,for the purpose of the present petition it requires to be noted that there is no controversy that the respondent workman has put in 305 days between his first and last appointment orders.

11. It would therefore appear and there cannot be any dispute, that if a workman has put in more than 240 days

in the same year, the provisions of section 25-F would be attracted, and if the same are not complied with, the termination must be held to be illegal and must be quashed and set aside.

12. The only exception to the rule which could be carved out, and which is sought to be argued by learned counsel for the petitioner, is that the petitioner was employed for a specific tenure, and that he was employed for a time bound project. If this was so, the learned counsel for the petitioner would seek to invoke the provision of section 2(oo)(bb) of the Industrial Disputes Act.

13. This submission is required to be examined in the context of the respective cases put up before the Labour Court by each side, and the evidence led thereon as also the findings of fact recorded by the Labour Court. The law is amply clear to the effect that this court while examining petition under Article 227 of the Constitution cannot reappreciate the evidence, and/or deal with the evidence on merits, as discussed in the opening paragraph of the present judgement, nor can this court permit either side to put up a new case which was not pleaded before the lower forum.

14. With a view to invoke the provisions of section 2(oo)(bb) of the Act learned counsel for the petitioner has sought to submit that the respondent workman was given merely a tenure appointment, for a time-bound project.

15. There cannot be any dispute that each of the appointment orders issued to the workman speaks of a tenure appointment of 29 days. There were approximately 9 or 10 such orders (the precise number of such orders is not on record). However, this controversy can be examined by this Court only where such a plea has been taken before the lower forum and appropriate evidence has been led thereon. Firstly it must be distinctly understood that the petitioner-employer has led the evidence only in a general and round about manner, as to the nature of the project upon which the workman was employed, etc. However, there is no plea that the workman was specifically employed on a time bound project and/or that his tenure appointment was on account of a specific time-bound project. No amount of examination of the employer's written statement before the Labour Court can bring forward this plea as actually having been raised before the Labour Court.Furthermore, even a detailed examination of the evidence led before the

Labour Court fails to disclose any evidence which could have or has been led with this plea in mind.

16. Thus, on the facts of the case I find that the petitioner-employer has not raised the necessary plea, nor has he led the appropriate evidence to substantiate the contention raised before this Court for the first time, that the workman was given a tenure appointment specifically for the duration of a time-bound project.

17. Even otherwise, the petitioner-employer cannot take recourse to section 2(oo)(bb) of the I.D. Act inasmuch as the same was not effective and in force on the date when the workman was terminated and/or refused further appointment. There is no controversy on this factual aspect. In other words, the said provision came into effect only after the expiry of the tenure laid down in the last appointment order, and the said provision was made operative only after the reference before the Labour Court was filed.

17.1 This factual aspect is required to be seen in the light of the current legal interpretation of the date on which the said provision can be effectively applied. It is a well settled principle laid down in a number of decisions that section 2(oo)(bb) of the I.D. Act is not retrospective in operation and can only be applied after it was brought into effect by the publication of the appropriate notification, as contemplated by the Amending Act which introduced this provision into the the Industrial Disputes Act. In the light of the well settled law as aforesaid, it would be futile for the petitioner-employer to contend that the appointment of the respondent-workman was a tenure appointment, and that by virtue of section 2(oo)(bb), section 25-F of the I.D. Act would have no application whatsoever.

18. As against this, the specific case put up by the workman before the Labour Court was that though he was given a number of successive tenure appointments of 29 days each, this practice was continued by the petitioner-employer for a fairly long time covering almost 12 months, by giving him artificial breaks in between. Relying upon this fact situation, the workman contended that the law as laid down by the Supreme Court strongly condemns the practice of giving artificial breaks in the circumstances where the services of the concerned employee are required otherwise than for a very short duration. As aforesaid, merely because the appointment orders mention that the appointment is on a temporary basis, or as a stop-gap arrangement, it does

not by itself create any satisfactory and/or legal justification for such artificial breaks. The very fact that the petitioner had been given such sequential appointment orders for almost a year, and then discontinued, can lead to only one conclusion viz. that the employer did not wish to permit a fact situation to develop where the employee could claim either absorption or regularisation as a regular employee. As aforesaid, once it is found that the employee was given artificial breaks, merely with a view to denying him the right of absorption or continuity, the fundamental and broad principles laid down by the Supreme Court come into play viz. that merely by giving artificial breaks, the employee cannot be denied the rights which would otherwise accrue to him in respect of regular employment. To that extent, therefore, the award cannot be faulted viz. where reinstatement has been allowed in favour of the workman and against the employer.

19. In this context the Labour Court has taken care of the change in the fact situation which prevailed on the date of the award viz. to direct reinstatement at Umrala. Even at present, when the interim order passed in the present petition is operative, the respondent workman is working at Umrala Sub-Division. However, learned counsel for the petitioner has raised a serious dispute as to the legitimacy of the directions given by the Labour Court of granting full backwages. This contention certainly requires serious consideration. There is no dispute that under the last appointment order, the respondent workman was employed for two months from the date of taking over/resuming duties. The precise date is not available on record. However, both the learned counsel jointly state that his last working day was 20th December 1981, and that on the tenure being completed no further orders have been issued. It can, therefore, safely be said that the grievance of the workman arose from 21st December 1981. However, the reference came to be filed as late as in the year 1987, and the workman filed his statement of claim as late as 30th June 1988.

20. It could be that the delay in deciding the reference is not directly within the control of the workman. However, if there is delay on the part of the workman in taking recourse to the legal remedy available to him, that delay does not require to be recompensated, nor is it be fair to fasten the burden of backwages for this period upon the employer. Looking to the facts and circumstances of the case, it appears just and reasonable to hold that the impugned award is upheld to the extent

where it directs reinstatement of the workman, but to modify the said award in respect of backwages.

21. In this context it will be just and equitable to hold and direct that the workman will be entitled to 50% of the backwages from 1st July 1988 upto the date when he was reinstated/re-employed under the interim orders passed by this Court in the present petition. The impugned award is therefore modified only to the aforesaid extent.

22. This petition is, therefore, partly allowed as discussed hereinabove, and rule is made absolute to the aforesaid extent with no order as to costs.

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